

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5771 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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Y.M. UJJAINWALA

Versus

DIST. DEVELOPMENT OFFICER

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Appearance:

None present for Petitioners

MR MUKESH R SHAH for Respondent No. 1, 2

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 17/02/98

ORAL JUDGEMENT

1. The matter was called out for hearing in the first round then in the second round and lastly, in the third round but none put appearance for the petitioner. Perused the special civil application, reply to the same, rejoinder to the reply and heard the learned counsel for the respondents.

2. Prayer has been made by the petitioners in this

special civil application for declaration of the artificial breaks given in the service of the petitioners to be illegal and arbitrary and for direction to the respondents to consider them in continuous service from the date of their initial appointments.

3. From the special civil application, I find that the petitioners have been given the appointments as workcharged Clerks only for 29 days from time to time and ultimately in later point of time because of nonavailability of the work, they continued in the service as daily wagers. This is clearly borne out from annexure 'B' which has been filed on the record of this special civil application. It is true that the petitioners were working since 1-7-1982 with break in service but this Court cannot be oblivious of the fact that for all the time they were given the temporary fixed term fresh appointment. In view of the decision of this Court in the case of Bhanmati Tapubhai Muliya vs. State of Gujarat reported in 1995 (2) GLH 228, such appointments come to an end automatically on the expiry of the period, for which no order of termination is required to be made. Such appointments does not confer any right to the petitioners to hold the post. Otherwise also, I do not find anything on record of this special civil application that the appointments have been given to the petitioners after following the procedure as laid down for regular recruitment.

4. The learned counsel for the respondents submitted that the work is not available for the petitioners in the office of the respondents and only as this Court has protected the petitioners they were continued in service for all the years and they have been paid the salary from the contingency fund. One of the petitioners has already left the service and he has gone to Abu Dhabi. In the present case, the petitioners have no legal or fundamental right to hold the posts where admittedly they were given the appointments only for fixed term. The petitioners were given the appointments as and when the work was there and on reduction of the work they were continued on daily wages but that continuation will not confer any right to them to hold the post. Otherwise also, the daily wagers have no right in the employment and they cannot be put at par with the regular employees. The posts and work both are not there with the respondents and as such the petitioners cannot be allowed to continue in the service. The respondents were under an obligation to continue them for all these years as this Court has granted the interim relief and they have continued these two petitioners by paying their salary

and wages from the contingency fund. From the very fact that they have been paid for all these years from the contingency fund, it is clear that there was no sanctioned post in the office of the respondents and so otherwise also in case the prayer made by the petitioners is allowed then it will amount to give the direction to the respondents to create the posts for them. It is the prerogative of the respondents to create or not to create the posts and this Court sitting under Article 226 of the Constitution cannot give such a direction.

5. In the second sitting, the counsel for the petitioners put appearance and he made a request to this Court that he may be heard in the matter and only contention made by him is that this matter is squarely covered by the decision of this Court given in special civil application No.6538/84 decided on 10th July, 1997.

6. I have gone through the judgment of this Court dated 10th July, 1997.

7. The Special Civil Application No.6538 of 1984 was decided on its own facts. It is true that in the Special Civil Application aforesaid, interim relief was granted in favour of petitioners therein but those persons were working in the regular pay scale whereas the petitioners in the present case are only daily wagers. Otherwise also, merely because the petitioners are working for all these years on daily wages under the interim relief granted by this Court, they cannot be given benefits of the Government Resolution. It is advantageous here to have a reference to the decision of the Hon'ble Supreme Court in the case of Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur v. Shree Kumar Tiwary and Anr., reported in (1997) 4 SCC 388, wherein it has been held that merely because continuing in service otherwise than on his own right and under the interim stay order granted by the Court, such continuation did not entitle him to regularisation. The eligibility provided for regularization has to be acquired by employee by continuing on his own right and not under the Court's interim order. The facts of that case in brief are that the respondent therein was appointed as ad hoc teacher in July 1986 and his services were terminated with effect from 30th June 1988. He filed writ petition which was dismissed by the single Judge of the High Court but the Division Bench allowed it on the ground that in the meantime, the respondent's services had been regularized by District Inspector of Schools vide order dated 27th October 1995 and therefore the respondent was entitled to continue in service. During the pendency of

the writ petition, the single Judge initially granted interim stay in respondent's favour but vacated it and the Division Bench again granted interim relief. The order of the District Inspector of Schools also mentioned that the respondent's regularization was subject to the result of the writ petition. In the context of those facts, their Lordships, Hon'ble Supreme Court, in para-6 and 7 of the judgment held as under:

"6. In view of the respective contentions, the question that arises for consideration is whether the respondent is entitled to the benefit of the Third Removal of Difficulties Order as indicated hereinbefore? Section 33-B(1)(a)(i) of the U.P. Secondary Education Services Commission Act, 1982 postulates among others, regularisation of a candidate who was appointed by promotion or by direct recruitment in the certificate of teaching grade before 13.5.1989 against a short-term vacancy in accordance with para 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and such vacancy was subsequently converted into a substantive vacancy. It is seen that the regular incumbent retired from service on 30.6.1988. Consequently, the temporary vacancy was deemed to have been converted into a substantive vacancy w.e.f. 30.6.1988. But the crucial question is whether the respondent was continuously serving the institution under clause (c) of Section 33-B(i)? Admittedly, the service of the respondent came to be terminated w.e.f. 30.6.1988. Though he had obtained the stay order and continued to be in service, it was not by virtue of his own right under an order of appointment, he continued in the office with permission of the management. In fact, in the recommendation made before the Selection Committee, they have stated as under:

"Ad hoc appointment of Shri Kumar Tiwari was made on 1.8.1986 L.T. Grade and vide notice dated 30.5.1988 his service were terminated. On the basis of the above order Shri Sri Kumar Tiwari obtained Stay Order No.13565 dated 29.7.1988 from the Hon'ble High Court. Therefore, appointment is disputed."

7. In fact, the regularisation order passed by the District Inspector of Schools also says

that it was subject to the result in the writ petition. The appeal being the continuation of the writ petition, the question arises whether the respondent is entitled to claim the benefit of Section 33-B(1)(a)(i) of the U.P. Secondary Education Services Commission Act, 1982. We have seen that his services came to be terminated on 30.5.1988 and the Amendment Act has no application. Hence, the Division bench was not right in giving direction that his regularisation will be subject to the further orders since the regularisation order itself means that it was subject to the result of the writ petition."

8. In the case in hand, otherwise than the interim relief which has been granted by this Court, whether the petitioner would have been continued in service for all these years is doubtful. The respondents in the reply to the Special Civil Application have made a categorical statement that looking to the workload of the Taluka Panchayat, it is quite impossible to continue the petitioners either on workcharge basis or daily wages any longer as there would not be funds from which they can be paid. It has further been stated that the works entrusted to the Taluka Panchayat are of quite temporary nature which can be completed within a particular period and are not permanent continuous work. Further case of the respondents is that due to increase in the workload of temporary nature, it was not found necessary to employ workcharge clerks and the petitioners were appointed or reappointed as workcharge clerks for 29 days on their application and when there was decrease in the work they were appointed on daily wages. The salaries of the petitioners were to be charged on the 2% of the work. When the work was completed and consequently when the workload decreased, necessary amount for the salaries of the petitioners was not available from the 2% of the funds of the remaining work. So the petitioners were taken up on daily wages and as the work will be completed there will not be any fund available for the salaries of the petitioners. As there will not be any permanent work their salaries cannot be charges on the Government funds available for the sanctioned strength of the staff of the Taluka Panchayat. The petitioners therefore cannot be continued and accommodated under the Taluka Panchayat though at present under the order of the Court they are continued.

9. During the course of arguments, the learned counsel for the respondents made a statement that the petitioners are being continued under the Court's order

and they are being paid from the contingency fund. From the reply of the Special Civil Application, it is clear that the posts are not available in temporary or permanent establishment of the Taluka Panchayat, nor the Taluka Panchayat is in a position to pay salary to the petitioners. This Court, sitting under Article 226 of the Constitution of India, cannot issue a Writ of Mandamus to the respondents to create posts for accommodating the petitioners who have been, at one point of time, given fixed term temporary appointments and reappointments and then they continued on daily wages. The petitioners are claiming the benefit of the Government Resolution dated 17th October 1988 but the benefit of this Resolution would have been available only to those employees who are continuing in service as daily wagers on 1st October 1988 as to their right and not under the Court's order. The petitioners were continued in the service as daily wagers otherwise than their own right. Continuation in service of daily wagers on the basis of interim stay granted by this Court will not confer any right of the regularisation or their pay in the regular basis etc. under the Government Resolution dated 17th October 1988.

10. In the result, this Special Civil Application fails and the same is dismissed. Rule discharged. Interim relief granted by this Court stands vacated. No order as to costs.

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